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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1957

SALVATORE BENANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1957 (R. 42), and a petition for rehearing was denied on June 4, 1957 (R. 48). The petition for a writ of certiorari was filed on June 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal court properly admitted evidence obtained solely by state officers seeking to

enforce state law where their search flowed from a telephone conversation intercepted pursuant to a state warrant authorized by state law.

STATUTES INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. 605, provides:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having be-

come acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Section 813-a of the New York Code of Criminal Procedure provides:

Ex parte order for interception. An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may

produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

STATEMENT

Following a jury trial, petitioner was convicted on a two-count indictment which charged possession of alcohol without having tax stamps affixed to the containers, and transportation of the same alcohol, in violation of 26 U. S. C. 5008 (b) (1) and 5642 (R. 3, 7, 32). Petitioner was sentenced to eighteen months imprisonment on each count, the sentences to run concurrently (R. 32). On appeal, the convictions were affirmed.

The evidence is not in dispute, and may be summarized as follows:

The State of New York, by constitutional provision and statutory enactment, permits the interception of telephone communications where law en-

forcement officials first obtain a warrant authorizing the procedure. New York Constitution, Article 1, § 12; New York Code of Criminal Procedure, § 813–a. The warrant, obtained ex parte, is issued only upon a showing of (1) reasonable ground to believe that evidence of crime will be obtained; (2) the purpose of interception, set out with particularity; (3) identification of the particular telephone line to be tapped and the person whose communications are to be intercepted.

The New York City police, believing that petitioner and his brother were violating state law by dealing in narcotics, obtained a warrant to tap the telephone of the Reno bar in New York City frequently used by the Benantis (R. 8, 12, 17). On May 10, 1956, the state police intercepted a message between petitioner and another person to the effect that "eleven pieces" were to be transported that night. Acting on this information, the police stopped a car driven by petitioner's brother, Angelo Benanti. They did not find any narcotics but did find eleven five-gallon cans of untaxed alcohol (R. 14). Federal authorities were notified and this prosecution followed.

The fact that the search came as the result of a telephone interception was not known to federal authorities until the cross-examination of one of the New York police officers (R. 28). At that point, defense counsel moved to suppress the evidence obtained by the search. The motion was denied on the grounds that no federal officer participated in the interception or the search and seizure, and that state law authorized the interception (R. 28). The Court of Appeals held

that the action of the New York police was in violation of Section 605 of the Federal Communications Act which forbids wiretapping, but that the evidence obtained as a result of this interception was admissible because no federal officer had participated in either the interception or the search and seizure (Pet. App. A).

ARGUMENT

The decision below accords with the prior decisions of this Court. In *Weeks* v. *United States*, 232 U. S. 383, 398, the Court held that it was not error to permit the use in a federal trial of papers and property improperly seized by state policemen for "it does not appear that they acted under any claim of Federal authority * * *." And in *Byars* v. *United States*, 273 U. S. 28, 33, Justice Sutherland for a unanimous Court said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

Petitioner does not take issue with this general rule upon which the decision of the Court of Appeals rests. He states (Pet. 5):

> It is now settled that the fruit of an illegal search and seizure by federal officers is inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383. It has likewise been held that the fruit of an illegal search and seizure by state officers is admissible in both state and federal courts.

Petitioner does ask this Court to develop a special rule for evidence flowing from wiretaps. His theory is that the prohibitions of Section 605 of the Federal Communications Act (*supra*, pp. 2–3) are somehow more restrictive on state conduct than the Constitutional prohibitions against search and seizure embodied in the due process clause of the Fourteenth Amendment, and that the statute requires the exclusion from federal proceedings of evidence obtained by wiretapping, even though no federal officer had anything to do with the wiretap. There is no merit in this contention which is disproved by the purpose and history of the exclusionary rule.

This Court recognized in *Wolf* v. *Colorado*, 338 U. S. 25, that the federal Constitution, by virtue of the Fourteenth Amendment, prohibits an unreasonable search or seizure by state officers; at the same time, the Court held that the state courts were not required to enforce the right of privacy by excluding evidence unlawfully obtained. But this difference between the rule in the federal courts and that binding on the states is not based on the theory that the Fourth Amendment is more important than the Fourteenth, or that state officers may violate the law where federal officers may not. The purpose of the federal rule is to discourage unlawful conduct, and the only persons as to whom such a rule in the federal courts is effective are federal officers. If an unlawful search or seizure was not participated in by federal agents, a rule of exclusion in the federal courts would not tend to preserve the right of privacy recognized by the

Fourth Amendment. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations by an exclusionary rule in the federal courts. Such a ruling would impede federal prosecution without furthering the judicial policy of discouraging future arbitrary intrusions on individual privacy.

It is for this reason that the exclusionary rule applies only where there has been participation in the illegal or unconstitutional conduct by federal officers. *Lustig* v. *United States,* 338 U. S. 74; *Irvine* v. *California,* 347 U. S. 128, 136. And as stated in Justice Frankfurter's opinion in *Lustig* v. *United States,* 338 U. S. 74, 78–79, a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

The rationale which limits the federal exclusionary rule, as to searches and seizures, to federal officers applies to wiretapping as well. While the protection accorded telephone conversations arises from Section 605, and not from the Fourth Amendment, the kind of privacy protected by the former is similar to that preserved by the latter. *Nardone* v. *United States,* 308 U. S. 338, 340–341; *Goldstein* v. *United States,* 316 U. S. 114, 120–121. Just as the states need not, under the Fourth and Fourteenth Amendments, adopt the exclusionary rule as to evidence illegally seized, so, under Section 605, the states need not exclude evidence obtained by wiretapping. *Schwartz* v. *Texas,* 344 U. S. 199. Similarly, just as the Fourth Amend-

ment and the *Weeks* rule do not require that federal courts exclude evidence unlawfully seized by state officers enforcing state law, Section 605 and the *Nardone* rule do not require that federal courts exclude evidence obtained by wiretapping by state officers enforcing state law. Under *Schwartz* v. *Texas*, 344 U. S. 199, state officers will not be deterred from engaging in wiretapping by the exclusionary rule which petitioner seeks. The purpose of a wiretap by a state officer is to obtain evidence of a violation of state law—evidence which the Court has already held to be admissible in state prosecutions.[1]

It would be particularly inappropriate for a federal court to apply its rule of exclusion to a situation such as that presented in the instant case, where the interception was done pursuant to a state warrant issued by authority of state law, with the kind of protection afforded by search warrants. There is room for doubt that Section 605 extends so far as to prohibit a state from legislating for limited interceptions under specific guarantees, so that it is debatable whether the interception in this case was illegal. But, in any event, where state officers enforcing state law act in con-

[1] Even if there might be some basis for construing Section 605 to preclude the knowing use by federal officers of evidence obtained by wiretaps, where they had no participation in the wiretapping, this is not that case. The federal officers were unaware of the antecedent wiretap:

> It is clear beyond cavil that no federal officer participated in any way in the wiretap or even knowingly offered any evidence which was discovered as a result of the wiretap. [Pet. App. 3a]

formity with the law of their state, the evidence thus obtained should not be excluded by a federal court.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] Petitioner attempts to show conflict between this case and *Rathbun* v. *United States*, 236 F. 2d 514 (C. A. 10), pending on writ of certiorari, No. 30, this Term; *United States* v. *White*, 228 F. 2d 832 (C. A. 7); and *United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7). However, all of those cases hold that there was no illegal "interception" of a telephone conversation on the facts of the particular case. Hence there was no occasion for the courts to reach the question of whether illegally obtained evidence would be admissible where state officers listened in on telephone conversations.

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